

ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1059

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

OGLALA SIOUX TRIBE,
Petitioner,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents,
and
POWERTECH (USA), INC.,
Intervenor-Respondent.

**On Petition for Review of an Order by the
United States Nuclear Regulatory Commission**

**INITIAL BRIEF OF INTERVENOR-RESPONDENT,
POWERTECH (USA), INC.**

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STATEMENT OF JURISDICTION

Intervenor-Respondent Powertech (USA), Inc. (Powertech) hereby accepts the Jurisdictional Statement provided by Federal Respondents, the United States Nuclear Regulatory Commission (NRC) and the United States of America (USA). Powertech concurs that the Hobbs Act confers jurisdiction upon this Court for purposes of challenging an order of the NRC by an “aggrieved party” within the timeframe prescribed by law. Petitioner, the Oglala Sioux Tribe (hereinafter the “Petitioner”), challenges the determination of NRC, an independent regulatory agency of the USA, to grant Powertech an NRC source and 11e.(2) byproduct material license to recover uranium using *in situ* leach uranium recovery (ISR) processes at the Dewey-Burdock ISR project site in the State of South Dakota. Petitioner also challenges the alleged failure of the Commission to suspend and/or revoke Powertech’s NRC license based on the Licensing Board’s determinations on Contentions 1A and 1B. Federal Respondents determined that Powertech’s application was adequately protective of public health and safety and the environment and was compliant with the Atomic Energy Act of 1954 (AEA), as amended by the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), and NRC’s implementing regulations at 10 CFR Parts 20, 40, including Appendix A Criteria, and 51.

STATEMENT OF THE ISSUES

Intervenor-Respondent Powertech hereby accepts the Statement of Issues and Glossary offered by Federal Respondents NRC and the USA.

STATEMENT OF FACTS

Intervenor-Respondent Powertech hereby accepts the Statement of Facts offered by Federal Respondents NRC and the USA with the following additions.

From a procedural perspective, Federal Respondents expressly note that the agency has filed a motion for summary disposition with the Licensing Board requesting that it grant a judgment as a matter of law concluding that Contentions 1A and 1B should be closed as NRC has satisfied the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) with respect to Powertech's license. Powertech notes that Petitioner was accorded "special" status as a litigant under the Licensing Board's decision when it directed NRC Staff to engage in government-to-government consultation solely with the Petitioner to offer them one more opportunity to conduct a site survey at the Dewey-Burdock ISR project site. This conclusion was reached despite the fact that there appears to be no such requirement in the NHPA or its implementing regulations and that other tribes, including Sioux tribes, accepted the previously offered site survey parameters, some of which submitted reports to NRC for its

consideration. The Licensing Board's decision expressly overruled the Advisory Council on Historic Preservation's (ACHP)¹ determination that NRC had satisfied the content and spirit of the Section 106 process to make a reasonable and good faith effort to engage and consult with Petitioner and to offer them a reasonable opportunity to conduct an identification effort for sites with historical and/or cultural/religious significance. Further, the Licensing Board also ignored the fact that Petitioner, as well as all other consulting parties identified by NRC during the Section 106 process, is accorded future opportunities to consult with NRC and Powertech during the construction and development of the Dewey-Burdock ISR project site, including properties that have not yet been identified or that have been identified but not yet assessed in accord with the ACHP and State Historic Preservation Officer (SHPO) endorsed programmatic agreement (PA).

From a factual perspective, in order to understand the manner in which NRC regulates licensed ISR operations, it is important to understand the nature of the ISR process. As a general proposition, there are three *primary* types of uranium recovery processes used by NRC uranium recovery licensees: (1) AEA-licensed conventional uranium mills processing uranium ores from surface or underground

¹ The ACHP has been delegated the authority by Congress to interpret the NHPA and to promulgate regulations (e.g., 36 CFR § 800 *et seq.*) implementing that statute.

mines (including heap leach facilities); (2) ISR uranium recovery operations; and (3) conventional metal recovery mills that recover uranium as a byproduct through side-stream recovery. Conventional mining involves the removal of uranium bearing ores from surface or underground mines, the breakdown of such ores at conventional mills (e.g., grinding, crushing, roasting, beneficiating), and chemical treatment to extract uranium. The conventional milling process results in the production of uranium (yellowcake), which is the first phase of the nuclear fuel cycle, and large volumes of mill tailings and other wastes that must be disposed of in licensed mill tailings impoundments.

The second form of primary production, ISR uranium recovery, leaves the underground ore body in place and continuously re-circulates native groundwater from the aquifer in which the ore body resides fortified with oxygen and/or carbon dioxide through the ore body. ISR uranium recovery was first tried on an experimental basis in the early 1960s with the first commercial facility commencing operations in 1974. Uranium deposits amenable to ISR uranium recovery occur in permeable sand or sandstone aquifers that typically are confined above and below by impermeable strata. These formations may either be flat or “roll-front” in cross-section, C-shaped deposits within a permeable sedimentary layer. These uranium-bearing formations were formed by the downgradient movement of groundwater bearing oxidized uranium in solution through the

aquifer with precipitation of the uranium occurring when the oxygen content decreases along extensive oxidation-reduction interfaces under the conditions noted above. *Uranium roll front deposition is ongoing on a regional basis today.* Roll fronts require broad areas of upgradient oxidation to keep uranium mobile until the oxidized water moves downgradient far enough to encounter a zone of abundant reductant. It is at this regional *reduction-oxidation interface* where the oxygenated water is reduced and uranium is deposited in what is known as a *redistributed* ore body that ISR uranium recovery operations are conducted.

The third type of uranium recovery (byproduct or side-stream recovery) does not take place at a licensed AEA uranium recovery facilities; but rather, at conventional metal or milling facilities that recover multiple minerals, including uranium in some cases, with this portion of their operation requiring an AEA source material license.

Uranium mineralization leaves a distinct radiochemical footprint in rock and water. The basis for geophysical logging is the presence of radioactive materials which allow the discovery and delineation of ore. Where the uranium ore zone is saturated by groundwater, the footprint extends itself into water. Given natural erosion processes, uranium and uranium progeny accumulated in the rock will manifest themselves in surrounding media. For a uranium ore body to be amenable to ISR uranium recovery using the type of recovery chemistry proposed for the

Powertech Dewey-Burdock ISR project, the ore zone must be saturated with relatively fresh water and the rock must have enough transmissivity for water to flow from injection to extraction wells. In other words, for ISR uranium recovery to work, the ore must be situated in an aquifer. *There are no ISR uranium recovery operations in ore bodies that are not in aquifers.*

Techniques for ISR uranium recovery have evolved to the point where it is a controlled, safe, and, indeed, an occupationally and environmentally *benign* method of uranium recovery that does not result in any significant, adverse impacts to workers, the surface (lands) or the subsurface (groundwater), including *underground* sources of drinking water (USDWs). After an ore body that is amenable to ISR uranium recovery is identified, the licensee develops well-field designs that progressively remove uranium from the identified ore body. Well-field design is based on grids with alternating extraction and injection wells and a ring of monitoring wells surrounding the entire recovery area to detect any potential *excursions* of solubilized uranium and other minerals from the uranium recovery production zone. The definition of an excursion is when mobile constituents of concern (COC) indicators expressly chosen because of their mobility provide an early warning system when reaching a monitor well prior to reaching an adjacent, non-exempt aquifer.

The sequential development of ISR uranium recovery well-fields is an example of the iterative, “phased” nature of ISR uranium recovery projects. The development of these well-fields and the accumulation of a complete sampling database cannot take place until a project operator installs baseline, production, and monitor wells. Engineers and geologists must revisit the previous day’s analysis before the next well is drilled, so new information becomes available every day. Prior to placing monitor wells, additional exploration and delineation has to be conducted to assure the wells are properly placed. As well-fields are developed, all wells, including monitor wells, are subject to mechanical integrity tests (MIT) to assure that they are functionally sound prior to being sampled. Sampling establishes water quality within and outside the ore zone (i.e., at the monitor wells) enabling the licensee to readily determine if an excursion has occurred. The results in one well-field may cause the site engineer or geologist to change design in the next. This process is both progressive and iterative, as each well-field is developed and tested with the mineral being progressively depleted from different parts of the ore body.

During active operations, native groundwater from the recovery zone in the aquifer is pumped to the surface for fortification with oxygen and carbon dioxide. This fortified water (i.e., lixiviant) is then returned to the recovery zone through a series of *injection* wells in varying patterns in the well-fields. The volume of water withdrawn from *extraction wells* in these patterns exceeds the volume of water

injected into the patterns creating a “cone of depression” that assures a net inward flow of water into the recovery zone of the aquifer so that adjacent, non-exempt USDWs will not be impacted by excursions of mining solutions. It also brings fresh water into the recovery zone to inhibit the build-up of contaminants that could reduce the efficiency of the operation.

The extraction pumping causes the injected lixiviant to move through the uranium ore body oxidizing and solubilizing the uranium present in the host sandstone. The water from the extraction wells is then piped to and circulated through ion-exchange (IX) columns containing synthetic resins in the form of small plastic spheres, which remove the uranium in a process essentially identical to that used to remove minerals from drinking water in a conventional home water softener. The uranium is first stripped from the IX resins using a brine solution (again similar to a water softener) and later precipitated chemically. This product is then dewatered and dried to produce saleable *yellowcake*.

After uranium removal in the IX column, the water in the circuit is re-fortified and re-injected as part of a continuous process until viable uranium recovery in the ore zone is exhausted. Since water from the ore body, already containing naturally occurring uranium and its progeny, is continuously refortified with oxygen and re-circulated through the sandstone to enhance uranium values removed in the IX columns, injection is “locked” to extraction (i.e., without extracting at least as much

water as is injected, the surface plant will run dry and re-circulation will stop). Injection cannot proceed without an equal or greater amount of extraction; therefore, over-injection across the area cannot take place. In order to keep the continuously operating system in balance, the extra water that is extracted is removed from the circuit as a "bleed." The "bleed," normally one-half (1/2) to three (3) percent of flow that contains elevated levels of radioactive uranium progeny is treated to remove these components and is then disposed using permitted land application, evaporation, deep well injection or some combination of these methods.

After uranium recovery ceases, the groundwater in the recovery zone is restored *consistent with baseline* or other water quality criteria that are approved by NRC prior to the commencement of active production operations. Upon completion of groundwater restoration, wells are sealed and capped below the soil surface using required plugging methods. Surface process facilities and soils are decontaminated, if necessary, and removed, and any necessary reclamation and re-vegetation of surface soils is completed. As a result, after site closure is completed and approved, there is no visual evidence of an ISR uranium recovery site, and the decommissioned site will be available for unrestricted (i.e., any future) use.

Liquid waste also is generated during groundwater restoration when uranium recovery production operations have ceased. Groundwater sweep uses existing wells to remove affected water from the ore zone which draws natural groundwater

flow into the recovery zone to replace the water removed. Additionally, in recent years, removed groundwater has been treated using reverse osmosis (RO) to create *de-ionized* water which is re-injected to accelerate groundwater restoration. In fact, groundwater restoration often uses a combination of these two techniques and, possibly, the injection of a reductant to optimize results, if needed. Restoration is not designed to return wellfield groundwater to drinking water standards; but rather, it is designed to minimize and/or eliminate the potential for post-restoration excursions to adjacent, non-exempt aquifers.

In nearly four (4) decades of operations, there have been *no significant, adverse impacts to USDWs* from ISR uranium recovery operations in the United States. Well-field balancing, use of the “bleed,” and extensive monitoring at ISR uranium recovery sites has been highly successful in assuring that the lixiviant solution is contained within the ore (recovery) zone. Before monitoring ceases, restoration is conducted to minimize and/or eliminate the potential risk of excursion that could result in the migration of contaminants from the exempted recovery zone portion of the aquifer to adjacent, non-exempt portions of the aquifer. This regulatory approach has been a success because there has never been

a report of contamination of adjacent, non-exempt USDWs outside of the ore zone and into the related area of review² as a result of ISR uranium recovery.

In light of this technological process and to assure adequate regulatory oversight of this industry, pursuant to its AEA authority, the AEC/NRC promulgated 10 CFR Part 40 and, later, Appendix A to Part 40 for conventional uranium milling operations. At the time of Appendix A's issuance, conventional uranium mining and milling operations were assumed to be the primary source of uranium production in the United States, so Appendix A Criteria reflect that assumption. Recently, as ISR has become the prevalent form of uranium recovery in the United States, NRC has applied portions of Part 40 and Appendix A Criteria to ISR licensing "as relevant and appropriate." Appendix A Criteria were created to be *flexible and performance-oriented rather than prescriptive*, since they address facilities (i.e., conventional mills and tailings impoundments) that can be affected by, and can affect, natural systems that can vary from site-to-site and even

² The "area of review" is essentially a "buffer zone" prescribed by EPA's underground injection control (UIC) program to provide additional protection for USDWs during ISR uranium recovery. 40 CFR § 146.6 requires that all ISR uranium recovery licensees must establish a fixed radius of not less than ¼ mile for the area surrounding the recovery zone. The regulation also states:

"In determining the fixed radius, the following factors shall be taken into consideration: Chemistry of injected and formation fluids; hydrogeology; population and ground-water use and dependence; and historical practices in the area."

40 CFR § 146.6(b)(2).

within the license boundary of a given site, and because they were to be applied to pre-existing uranium milling facilities. As stated in the Preamble to Appendix A:

“In many cases, *flexibility* is provided in the criteria...on a site-specific basis.... *Licensees or applicants may propose alternatives to the specific requirements* in this appendix. The alternative proposals may take into account local or regional conditions, including geology, topography, hydrology, and meteorology.”³

This flexibility is also reflected in the Preamble’s statement that:

“In implementing this appendix, the Commission will consider ‘*practicable*’ and ‘*reasonably achievable*’ as equivalent terms. Decisions involving these terms will take into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest.”⁴

Since ISR uranium recovery operations similarly take place in natural systems, NRC has approached application of relevant Appendix A Criteria to, and the development of license conditions for, such operations to provide them with flexibility (e.g., the iterative, “phased” licensing approach).

Since Appendix A Criteria were focused primarily on conventional uranium milling facilities, to facilitate the submission of complete license applications for ISR uranium recovery operations, NRC created an ISR Standard Review Plan

³ 10 CFR Part 40 Appendix A, Preamble (emphasis added).

⁴ *Id.*

(SRP or NUREG-1569).⁵ The SRP identifies Appendix A and other relevant regulatory requirements, NRC guidance, and standard industry practices that should be used in preparing ISR uranium recovery license applications. The SRP provides detailed insight into the nature of ISR uranium recovery projects and NRC's approach to their regulation. As a general proposition, ISR uranium recovery projects are process-oriented, phased projects, as demonstrated, with clarity, by SRP Chapter 2 entitled *Site Characterization* and Chapter 5 entitled *Operations*. These chapters show that ISR uranium recovery projects are developed through a process involving *pre-operational* site characterization followed by detailed, progressive *operational* site development that occurs only after licensing is complete.⁶ As noted above, this iterative, "phased" approach is

⁵ United States Nuclear Regulatory Commission, NUREG-1569, *Standard Review Plan for In Situ Leach Uranium Extraction License Applications* (June, 2003) (Intervenors' Joint Appendix, Volume III, p. 612).

⁶ While not binding, the Commission has stated in its decisions in *Seabrook* and *Private Fuel Storage* that Commission guidance documents are nonetheless entitled to special weight. See *Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-05, 75 NRC 301, 314, n.78 (2012); see also *In the Matter of Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001). In its 2005 *Yankee* decision, the Commission further elaborated on the role of NRC Staff guidance with respect to regulatory compliance:

"We recognize, of course, that guidance documents do not have the force and effect of law. Nonetheless, guidance is at least implicitly endorsed by the Commission and therefore is entitled to correspondingly special weight." *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 375, n.26 (2005); see also *Consumers Power Co.* (Big Rock Point Nuclear

reflected in the sequential development of ISR uranium recovery well-fields, upper control limits (UCLs) for constituents of concern (COC) associated with operations and restoration, monitor wells to protect water quality, and appropriate financial assurance, which is reviewed on an annual basis.

As an independent regulatory agency, NRC is not bound by regulations promulgated by the Council of Environmental Quality (CEQ) under the National Environmental Policy Act of 1969 (NEPA).⁷ As stated in the Federal Register in 1984:

“as a matter of law, the NRC as an independent regulatory agency can be bound by CEQ’s [Council on Environmental Quality’s] regulations only so far as those regulations are procedural or ministerial in nature. NRC *is not bound* by those portions of CEQ’s regulations which have a substantive impact on the way in which the Commission performs its regulatory functions.”⁸

However, NRC promulgated regulations at 10 CFR Part 51 designed to facilitate compliance with NEPA. Pursuant to these regulations, NRC requires that a detailed environmental evaluation of the potential impacts of, and alternatives to, proposed uranium recovery operations.⁹ Unless mandated by regulation to

Plant), ALAB-725, 17 NRC 562, 568 & n.10 (1983) (finding that NUREGs are entitled to considerable prima facie or special weight).

⁷ 42 U.S.C. § 4321 *et seq.*

⁸ 49 Fed. Reg. 9352 (March 12, 1984) (emphasis added).

⁹ See generally 10 CFR Part 51.

perform an environmental impact statement (EIS), NRC Staff is required to conduct an initial environmental assessment (EA) and to determine whether the potential impacts of the proposed action warrant a finding of no significant impact (FONSI) or an environmental impact statement (EIS).¹⁰ In the event that an EIS is warranted, NRC first prepares a draft EIS for issuance and public comment and, upon completion of the public comment period, NRC responds to comments and issues an final EIS.

NRC also requires an applicant to submit detailed procedures, protocols, and other data and information demonstrating that the applicant is financially and technically capable of performing the proposed action under the conditions and requirements prescribed by NRC. In other words, NRC requires that an applicant provide adequate information demonstrating that it is financially qualified to perform NRC license requirements and that its personnel, procedures, and protocols are technically sufficient. Based on the FEIS and the applicant's license application, NRC determines whether a license should be issued or not and what, if any, appropriate conditions should be added to the applicant's proposed license.

¹⁰ 10 CFR §§ 50.20-51.21; *see also* United States Nuclear Regulatory Commission, NUREG-1748, *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs*, <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1748/> (August, 2003).

STANDARD OF REVIEW

Intervenor-Respondent Powertech hereby accepts the Standard of Review offered by Federal Respondents NRC and the USA.

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SUMMARY OF THE ARGUMENT

Intervenor-Respondent Powertech hereby accepts the Summary of the Argument provided by Federal Respondents NRC and the USA.

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ARGUMENT

As a preliminary matter, Intervenor-Respondent Powertech hereby adopts each of the arguments raised and the text of pertinent statutes and regulations set forth by Federal Respondents NRC and the USA in their Initial Brief. Intervenor-Respondent Powertech also offers the following arguments in support of Federal Respondents.

A. This Court Should Take Notice of the Dissent of Commissioner Svinicki in This Proceeding Regarding the Advisory Council on Historic Preservation

When the Licensing Board's decision was appealed to the Commission by all parties, the Commission denied review of several aspects of the appeals, but however, the Commission did accept review of Contentions 1A and 1B with reference to suspension of Powertech's license due to alleged procedural errors in compliance with NEPA and the NHPA. *See Powertech (USA), Inc.*, (Dewey-Burdock ISR Project), CLI-16-20 at 33 (JA at ____). During the course of its evaluation of all parties' appeals, the Commission assessed the Licensing Board's handling of Contentions 1A and 1B with respect to the ACHP's role in NRC Staff's conduct of the Section 106 process. With respect to Contention 1A based on compliance with NEPA, Commissioner Svinicki stated:

“While the Commission would normally hesitate to wade through such a detailed factual record ourselves, particularly when we have not had the advantage of observing testimony first hand, in this case

other findings from the Board indicate that the missing information was not reasonably available. Specifically, upon reviewing the record in its entirety, the Board concluded that the amount of ‘funds requested to collect tribal cultural information’ by the Oglala Sioux was ‘patently unreasonable.’ If information is only available at a patently unreasonable cost, here potentially four million dollars to conduct one part of the cultural survey (itself only one part of the larger NEPA review), it follows that such information is not reasonably available. Moreover, because this information missing from the FSEIS was not reasonably available, its absence from the FSEIS analysis cannot be a basis upon which the FSEIS fails to meet NEPA's hard look standard.”

Id. at 100-101 (JA at ____).

Over the course of the past seven (7) years, the Petitioner has consistently been reticent to engage NRC Staff or Powertech in an effort to participate in an identification effort despite its constant assertions that there are properties of cultural and/or historical/religious significance at the Dewey-Burdock ISR project site. Commissioner Svinicki’s references to “patently unreasonable” demands for financial compensation are further exacerbated by the fact that the Petitioner had two (2) separate opportunities to participate in an identification effort, the first of which was an opportunity under parameters and with financial compensation offered by Powertech and endorsed by NRC Staff and which initially was accepted by the Petitioner. The second opportunity was afforded when the members of the Licensing Board were given a chance to tour the Dewey-Burdock ISR project site prior to the August, 2015 evidentiary hearing. However, while several tribes, including some Sioux tribes, accepted this proposal and/or provided identification

reports to NRC Staff, Petitioner agreed and then never participated in the identification effort. As such, it defies logic that the Licensing Board determined that the efforts with the Petitioner were unreasonable where the exact same efforts with the other tribes were deemed reasonable. Nowhere in LBP-15-16 or CLI-16-20 does the Licensing Board or the Commission conclude that the efforts at compliance with the NHPA with tribes other than the Petitioner were unreasonable. For this reason, Powertech argued in its appeal to the Commission that the Licensing Board effectively granted the Petitioner special status under the NHPA as a litigant when it directed that Petitioner should have an additional opportunity to participate in the identification process.

As stated by NRC Staff, LBP-15-16¹¹ directed it to satisfy the “hard look” standard under the statute and prevailing case law and concluded that the FSEIS should be supplemented with identification of any properties of historic or cultural/religious significance and an assessment of said properties. *See* LBP-15-16 at 708. However, importantly is the pivotal reason that no solution has been reached under the Licensing Board’s directive is that the Petitioner will not even participate in the *identification* phase of this process. Over the past 7 years, the Petitioner has consistently resisted participating in this part of the process but, per LBP-15-16, NRC Staff afforded it one more opportunity to participate under

¹¹ *See Powertech (USA), Inc.*, LBP-15-16, 81 NRC 618 (2015).

parameters that were previously deemed reasonable by the Licensing Board. The Petitioner continued its resistance both by consistently delaying responses to NRC Staff inquiries and site survey invitations and then by submitting its May 31, 2017, rejection letter citing the possibility of “a couple years” more of consultation and site survey development and conduct. The FSEIS for the Dewey-Burdock ISR project included the information gathered by NRC Staff from several tribes that agreed to the offered site survey parameters and submitted identification reports. NRC Staff also noted that the Petitioner was actively consulted both in general with other consulting parties and specifically after the issuance of LBP-15-16. According to NEPA’s “rule of reason,” it is mandated that the inquiry is limited to address only impacts that are reasonably foreseeable—not remote or speculative. *See Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station, ALAB-919, 30 NRC 29, 44 (1989) (citation omitted). Based on this and the fact that there has been no progress over the past seven (7) years for NRC Staff to obtain information from the Petitioner on properties of historic or cultural/religious significance, the NEPA inquiry must stop here. In the event that it is not determined that the NEPA process has been adequately satisfied prior to the issuance of CLI-16-20, let alone after its issuance, then it is conceivable that licensing actions over a multitude of federal agencies will continue in perpetuity without resolution. Thus, it is important that this Court take notice of

Commissioner Svinicki's dissent in CLI-16-20 as it argues persuasively that NRC Staff has now satisfied its NEPA responsibilities for the Dewey-Burdock ISR project site.

With respect to Contention 1B based on compliance with the NHPA, Commissioner Svinicki also stated:

“As noted above, the Commission generally hesitates to make factual findings in the first instance, but again the record developed by the Board is sufficient to answer the question posed: here, whether the Staff provided a reasonable opportunity for consultation. One of the most striking aspects of this record is that the ACHP, the agency expert in implementing the NHPA, signed the NRC's Programmatic Agreement for the Dewey-Burdock project, and in so doing, found that it set forth a phased process for compliance with section 106. While the ACHP's agreement is not binding on the Commission, its findings are entitled to considerable weight.”

See CLI-16-20 at 97 (JA at __)

As stated previously, the satisfaction of NHPA requirements is inextricably linked to the satisfaction of NRC Staff's NEPA responsibilities. Through NRC's recent motion for summary disposition, it has been demonstrated that NHPA responsibilities for the Dewey-Burdock ISR project have been satisfied and the inclusion of the results of NRC's efforts to re-engage the Petitioner yet again are adequate to satisfy NEPA.

It is typical for a federal agency such as NRC to be the “lead agency” when addressing an undertaking under the NHPA to administer its process under this statute in a manner that it deems appropriate. Indeed, NRC Staff has successfully

completed the Section 106 process for six (6) new ISR projects using NUREG-1910 entitled *Generic Environmental Impact Statement for In Situ Leach Uranium Milling Facilities* to create supplemental environmental impact statements (SEIS).

B. This Court Should Dismiss the Petitioner's Petition for Review for Lack of Jurisdiction

As correctly argued by NRC, this Court should dismiss Petitioner's Petition for Review of Contentions 1A and 1B, and subsequently the entire Petition, for lack of jurisdiction. It is well-understood that the Licensing Board ordered further NHPA Section 106 consultation under the guise of Contention 1B and further supplementation of the FSEIS under Contention 1A to account for these additional consultations. As cited by NRC Staff, it is critical to evaluate the possibility of a lack of jurisdiction based on the potential disruption to the "orderly process of adjudication and whether rights or obligations have been determined or legal consequences will flow from the agency action." *Adenariwo v. Fed. Maritime Comm'n*, 808 F.3d 74, 78 (D.C. Cir. 2015). As NRC's brief has stated, NRC Staff has filed for summary disposition of both of these Contentions citing that the Licensing Board's directive leaving Contentions 1A and 1B open, as expressly upheld by the Commission, has been satisfied. This fact alone demonstrates that there continues to be adjudicatory processes that must be followed prior to addressing the issue of whether (1) Powertech's license should be modified or revoked as alleged by the Petitioner or (2) there are any deficiencies in the final

processes engaged in by the Licensing Board pursuant to this summary disposition motion that could later be appealed to the Commission and, potentially, to this Court. Indeed, the latter of these issues has not even been offered by the Petitioner as grounds for an appeal, but could be offered at a later date in the event that the Licensing Board summarily disposes of these two Contentions and such action is appealed by Petitioner to the Commission. Further, should NRC Staff not prevail on the motion for summary disposition, the path towards finality will be extended into further NHPA Section 106 consultation, which in effect could prolong this process for an unknown timeframe. Based on this and accepting all of NRC Staff's arguments, Powertech asserts that this Court should either dismiss Petitioner's Petition for Review for lack of jurisdiction or hold further action on this case in abeyance pending resolution of the motion for summary disposition currently before the Licensing Board.

C. The Petitioner Fails to Show That the Commission Failed to Adequately Address Groundwater Quality Baseline

Petitioners consistently raise concerns regarding the Licensing Board's handling and the Commission's review of how groundwater quality is assessed and protected within the scope of a license application review and the conduct of licensed activities. Indeed, each of Petitioners' admitted contentions pertains directly to how NRC regulations address groundwater quality for uranium recovery licensees. More specifically, Petitioners raise concerns regarding the adequacy of

NRC Staff's analysis of baseline groundwater quality conditions in order to establish standards to evaluate the potential for excursions and groundwater restoration during and after licensed ISR operations. However, Petitioners concerns aside, the Commission has been empowered with the ability to implement the requirements of the AEA and, more specifically, the safe handling of source material and 11e.(2) byproduct material (or the wastes from source material milling). As such, a review of the Commission's implementing regulations demonstrates that Powertech's NRC license and its record of decision (ROD) were issued in accordance with the AEA.

With respect to Petitioners' insistence that the final SEIS did not adequately address groundwater quality appropriately, this assertion is inconsistent with existing NRC regulations at 10 CFR Part 40, Appendix A, Criterion 5B(5) to ISR operations, which has now been deemed to apply as a matter of law.¹²

As a general proposition, the development of final groundwater quality standards on a wellfield-by-wellfield basis at ISR sites is conducted in the same "phased" manner as described in the sections above. There are two "phases" to

¹² See United States Nuclear Regulatory Commission, Regulatory Issue Summary 2009-05, *Uranium Recovery Policy Regarding: (1) The Process for Scheduling Licensing Reviews of Applications for New Uranium Recovery Facilities and (2) The Restoration of Groundwater at Licensed Uranium In Situ Recovery Facilities* (April 29, 2009) ("Accordingly, the requirements in Criterion 5B of Appendix A apply to restoration of groundwater at uranium ISR facilities").

gathering of site-specific groundwater quality data and the formulation of groundwater quality standards. The first phase under 10 CFR Part 40, Appendix A, Criterion 7 envisions gathering and analysis of “baseline” groundwater quality data sufficient to obtain an NRC license under the AEA. “Baseline” data gathering requires a license applicant to gather sufficient groundwater quality data to *characterize* the affected environment. This interpretation of Criterion 7 is reflected by language in NUREG-1569 when it states:

“Reviewers should keep in mind that the development and initial licensing of an in situ leach facility is not based on comprehensive information. This is because in situ leach facilities obtain enough information *to generally locate the ore body and understand the natural systems involved*. More detailed information is developed as each area is brought into production....[R]eviewers should ensure that sufficient information is presented to reach only the conclusion necessary for initial licensing.”

NUREG-1569 at 1-1.

As discussed in the final SEIS, Criterion 7 data gathering requirements result in the development of pre-operational baseline water quality levels which are used to license the ISR project and *is not intended to represent final groundwater quality standards* which are addressed by Criterion 5B(5).¹³

¹³ 10 CFR Part 40.32(e) otherwise known as the “construction rule,” which specifically states that “commencement of construction prior to this conclusion [full environmental evaluation] is grounds for denial of a license to possess and use source and byproduct material in the plant or facility.” 10 CFR § 40.32(e) (2017). The Commission’s interpretation of this Rule is that installation of a full wellfield and monitor well network, which is necessary to determine Criterion 5B(5) groundwater quality standards, constitutes construction and, thus, would result in

The second phase of data gathering envisioned by the Commission under its 10 CFR Part 40, Appendix A Criteria and its Commission-endorsed performance-based licensing program is Criterion 5B(5) “Commission-approved background” (CAB) groundwater quality standard, which is the basis for appropriate site-specific groundwater standards against which operational groundwater and restoration goals are set. Pursuant to 10 CFR Part 40, Appendix A, Criterion 5B(5), three (3) permissible groundwater protection standards for uranium recovery facilities such as ISR facilities are identified: (1) “Commission-approved background” or (2) a maximum contaminant level (MCL), *whichever is higher*, or (3) an alternate concentration limit (ACL). Under the Uranium Mill Tailings Radiation Control Act of 1978, which amended the AEA, EPA conducted a rulemaking (resulting in 40 CFR Part 192) pursuant to its responsibility to develop *generally applicable standards* for uranium mill tailings facilities, including Part 192.32 which specifically incorporates the aforementioned Resource Conservation and Recovery Act of 1976 (RCRA)¹⁴ 40 CFR § 264 groundwater standards, including ACLs. NRC’s conforming 10 CFR Part 40 rulemaking to comply with UMTRCA’s requirement that NRC conform its regulations to EPA’s *generally*

denial of a license application. As a result, NRC issues ISR licenses allowing licensees to begin to address detailed plans for installation of wellfields and monitor wells and development of groundwater quality standards only after their license is granted.

¹⁴ 42 U.S.C. § 6901 *et seq.* (2017).

applicable standards for possession and use of source and 11e.(2) byproduct material incorporate 40 CFR § 192.32's groundwater corrective action standards into the Commission's regulations (e.g., 10 CFR Part 40, Appendix A, Criterion 5B(5)).

ACLs are Commission-approved *alternative* groundwater quality standards originating with the United States Environmental Protection Agency's (EPA) RCRA regulations, which were promulgated through a full rulemaking, including notice and public comment. EPA's RCRA regulations at 40 CFR Part 264, Subpart F prescribe groundwater protection standards for RCRA facilities, including Part 264.94(a)(3) which discusses ACLs.

An ACL is a site-specific, constituent-specific, risk-based human health standard that requires a detailed technical and environmental justification through NRC license amendment to demonstrate that restoration to that level is adequately protective of human health and the environment. In order for ACLs to be granted, an ISR operator must submit a license amendment application consistent with Criterion 5B(6)'s nineteen (19) factors and applicable guidance, and *all* such applications require a complete safety review consistent with 10 CFR Part 40 regulations and Appendix A Criteria and a complete 10 CFR Part 51 environmental review with, at a minimum, an environmental assessment (EA) with a finding of no significant impact (FONSI).

Pursuant to the Commission's regulations, an ISR licensee is required to cease licensed uranium recovery operations when the identified ore body is depleted and immediately commence groundwater restoration. In accordance with the Commission's "as low as reasonably achievable" (ALARA) standard, an ISR licensee must strive to return groundwater within the confines of a given wellfield to requisite primary standards (i.e., CAB or an MCL, whichever is higher). In the event that a licensee cannot return such groundwater to this standard, such licensee is entitled, *as a matter of law*, to apply for an ACL for one or multiple COCs. As noted above, Criterion 5B(6) sets forth a series of nineteen (19) factors the Commission will consider during the evaluation of an ACL application. 10 CFR Part 40, Appendix A, Criterion 5B(6) (2017). Many of these factors cannot be satisfied until NRC has issued a license and the licensee has completed both licensed uranium recovery operations and as low as reasonably achievable (ALARA) groundwater restoration in a given wellfield. Based on these Criteria, it is well-understood that an ISR licensee cannot even apply for an ACL until it has demonstrated that its efforts to complete groundwater restoration to the primary or secondary standard satisfies the ALARA standard.¹⁵

¹⁵ This phased approach to groundwater data gathering and analysis is consistent with the Commission's holding in *Hydro Resources, Inc.* (CLI-06-01), which was tacitly endorsed by the United States Court of Appeals for the Tenth Circuit. See *Marilyn Morris et al v. US NRC*, 598 F.3d 677 (10th Cir. 2007).

Given that the Supreme Court has stated that when a court is reviewing an agency's action(s), the "ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation," the Commission's interpretation of the application of 10 CFR Part 40, Appendix A, Criterion 5B(5) to ISR operations should be sustained as consistent with its implementing AEA regulations, guidance, and prior decisions regarding such interpretations.¹⁶

The Petitioner's assertion that NEPA at 40 CFR § 1502.15 requires that an agency "fully describe the environment of the areas to be affected or created by the alternative under consideration" does not comport with the analyses performed and the conclusions reached by NRC Staff and the Commission.¹⁷ The Petitioner's argument first wholly omits the broad-based conclusions established in NUREG-1910 which were incorporated into Powertech's SEIS for the Dewey-Burdock ISR project. Then, the Petitioner fails to show how the Commission's interpretation of its own regulations, which it is empowered to do under the AEA, is inadequate to

¹⁶ See e.g., *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

¹⁷ On page 26 of their Brief, Petitioner argues that the AEA license currently possessed by Energy Fuels Resources, Inc. for the Utah-based White Mesa Mill license, a potential 11e.(2) byproduct material disposal location, is not valid. This is inaccurate because this license is currently in timely renewal and is also irrelevant, because the Commission does not require an 11e.(2) byproduct material disposal license to be in place until before the commencement of license ISR operations.

satisfy the its mandate of adequate protection of public health and safety. Indeed, its reference to Regulatory Guide 4.14 as an “outdated” document fails to account for the fact that this document, like other guidance documents, serves as a “guide” to NRC Staff when reviewing site-specific conditions and is not, in and of itself, dispositive. The Petitioner’s assertions have not shown, as a scientific matter, that NRC Staff’s analyses of baseline groundwater quality under Criterion 7 was inadequate and that further development of CAB under Criterion 5B(5) will not adequately satisfy Commission regulatory requirements. Therefore, the Commission’s application of the groundwater quality analysis requirements, as approved in *Hydro Resources, Inc.* and *Strata Energy, Inc.*¹⁸ was correct, and this Court should apply appropriate deference to the Commission’s findings.

D. The Commission Correctly Upheld the Board’s Determination to Require Additional National Historic Preservation Act Consultation Without Ordering Vacatur of the License or Supplementation of the Final SEIS

A major argument presented by Petitioner is based on the dissenting opinion offered by NRC Commissioner Baran in CLI-16-20 in which he opines that the Board should have suspended Powertech’s license pending supplementation of the final SEIS to address potential impacts of continued NHPA Section 106 consultation. *See Powertech (USA), Inc.* (Dewey-Burdock ISR Project), CLI-16-

¹⁸ *See Strata Energy, Inc.* (Ross ISR Project), CLI-16-13, 2016 NRC LEXIS 21 (2016).

20 at 110-112 (JA at ____). Essentially, Petitioners argue that this dissent necessitates that any license should be stayed or vacated if additional information is identified or further NHPA Section 106 consultation is ordered in a hearing after a license and final SEIS (ROD) have been issued.

First and foremost, as stated above, the Commission is not required to comply with portions of CEQ regulations that have some substantive impact on the manner in which the Commission performs its primary regulatory responsibilities.¹⁹ NRC Staff has been delegated the authority to interpret the Commission's AEA regulations *inter alia* at 10 CFR Part 40 and Appendix A, as well as other regulations applicable to Powertech's requested and currently effective NRC combined source and 11e.(2) byproduct material license pursuant to 10 CFR § 1.41(b)(18 & 19). Its interpretation of the Commission's 10 CFR Part 51 regulations yielded a result that, pursuant to 10 CFR § 51.20(b)(8), an EIS-level analysis was required for Powertech's Dewey-Burdock ISR project and that tiering off NUREG-1910 was expressly permitted by CEQ regulations and allowed for preparation of an SEIS.²⁰ See 40 CFR § 1502.20 (2017). This document was

¹⁹ See generally 49 Fed. Reg. 9352 (March 12, 1984).

²⁰ NRC Staff prepared, issued for public comment, and finalized a programmatic or GEIS for ISR facilities that is intended to have SEISs tiered off of its findings. It is this GEIS that serves as the primary, programmatic basis for the Dewey-Burdock ISR Project SEIS. As stated above, to date, six (6) SEISs have been prepared and finalized for ISR projects since the development of the GEIS, including the Dewey-Burdock ISR Project.

prepared in accordance with NRC regulations and was issued in draft form for public comment. The SEIS was then finalized and submitted for United States Environmental Protection Agency (EPA) concurrence pursuant to applicable rules. Even though Powertech's license was issued prior to the conclusion of the administrative litigation below, Petitioners are not entitled to a retroactive application review based on a simple modification by the Board. According to *Swinomish Tribal Community* and *Friends of the River*, this Court has endorsed the practice of modification of an EIS by either Board or Commission order or the adjudicatory record, as such information or requirement is part of the final ROD under NRC's rules and regulatory practices.²¹ Petitioners offer no contradictory precedent that would give this Court reason to overturn these case.

Moreover, 10 CFR § 2.1213 provides express requirements for parties seeking to stay the effectiveness of a license, which are substantially similar to the requirements for an injunction in adjudicatory proceedings. Petitioners failed to avail themselves of this opportunity after issuance of LBP-15-16 and CLI-16-20 and have not made a factual showing that the process followed by NRC Staff, the Board, and the Commission would require suspension or vacatur of the license. Most importantly, absent a showing of irreparable harm, there is no need for

²¹ *Swinomish Tribal Comty v. FERC*, 627 F.2d 499 (D.C. Cir. 1980); *Friends of the River v. FERC*, 720 F.2d 93 (D.C. Cir. 1983).

vacatur of Powertech's license. No imminent hazard can be demonstrated as a result of the additional NHPA Section 106 consultation in light of the presence of the NRC/BLM/ACHP-approved PA that ensures that Petitioner can be included in further consultation on properties identified but not yet assessed and those that have not yet been identified. Moreover, Petitioner previously attempted to seek a stay of Powertech's license based on improper NHPA Section 106 consultation and failed in 2014. Therefore, this Court should uphold the Commission's determination that the ROD is adequate to sustain Powertech's license despite the imposition of a new license condition.

E. The Petitioner's Assertions on Adequate Review of Mitigation Measures Have No Merit

The Petitioner alleges that the Commission's FSEIS for the Dewey-Burdock ISR project was inadequate due to a failure to properly assess mitigation measures. These allegations completely ignore current case law on this subject and the existence of additional safeguards in Powertech's NRC license and ROD.

As a matter of law, "NEPA does not require 'a fully developed plan that will mitigate environmental harm before an agency can act,' rather, NEPA requires only that 'mitigation be discussed in sufficient detail to ensure that environmental consequences have been evaluated.'" *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1522 (10th Cir. 1992), *quoting Methow Valley*, 490 U.S. at 352-53; *see also Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-06-29, 64 NRC

417, 427 (2006) (discussing that an EIS need not contain “a complete mitigation plan” or even “a detailed explanation of specific [mitigation] measures which will be employed” and stating that mitigation measures “need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements.”)

“The discussion of effectiveness of mitigation measures does not need to be highly detailed.” *Moapa Band of Paiutes v. United States BLM*, No. 10-CV-02021-KJB-(LRL), 2011 U.S. Dist. LEXIS 116046 (D. Nev. Oct. 6, 2011); *see also Wilderness Society v. United States BLM*, 822 F. Supp. 2d 933, 943-44 (D. Ariz. 2011) *aff’d Wilderness Society v. BLM*, 526 Fed. Appx. 790, 2013 U.S. App. LEXIS 10708 (9th Cir. 2013) (providing examples of how courts assess mitigation measures).

NEPA does not require that NRC restrict its discussion of mitigation measures to a single FSEIS chapter, rather than discussing such measures throughout the FSEIS. This is how the NRC Staff typically prepares an EIS, and it is consistent with how other agencies prepare such documents. *See, e.g., Wilderness Soc’y v. United States BLM*, 822 F. Supp. 2d 933, 942–943 (D. Ariz. 2011). NEPA also does not require an agency to prove that the mitigation measures it identifies will be effective in reducing environmental impacts. *See Biodiversity Conservation Alliance v. Bureau of Land Management*, No. 09-CV-

08-J, 2010 U.S. Dist LEXIS 62431 (D. Wyo. 2010). Courts have confirmed that an agency need not assign an effectiveness rating to mitigation measures. *See North Alaska Envtl. Ctr v. Norton*, 361 F. Supp 2d., 1069, 1080 (2005). The assessment of resource areas such as mitigation measures also involve the preparation of action plans after issuance of a license, which is consistent with the Commission's approved policy of performance-based licensing. *See Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-99-22 (July 23, 1999).

Powertech's FSEIS at Chapter 5 specifically addresses mitigation measures in both a generic (using NUREG-1910) and specific manner (site-specific analysis and parameters for future mitigation plans). Powertech's ROD also includes the aforementioned PA which specifically prescribes mitigation in the form of future consultation with all consulting parties, if interested, including the Petitioner. Indeed, Powertech's expert witness, Dr. Lynne Sebastian, testified that Powertech was asked by NRC Staff to be an invited signatory to the Programmatic Agreement, since Powertech will be "responsible for funding and carrying out virtually all of the protection and mitigation measures committed to in the Programmatic Agreement." *See id.* at 14, ¶ A.45. By definition, a PA is by far the most detailed and intensive mechanism under the NHPA to ensure that 36 CFR § 800.6 requirement to mitigate potential adverse effects to identified historic and/or cultural properties is satisfied. Given that not only two federal agencies (NRC and

BLM), the SHPO, *and* the ACHP signed the PA, it appears mitigation measures were adequately assessed in the FSEIS for historic and cultural resources. Further, NRC does not limit its analysis of mitigation measures to FSEIS, Chapter 5, but also discusses mitigation measures throughout the FSEIS impact analysis. *See e.g.*, JA at ___. Therefore, Petitioner's allegations with respect to mitigation measures are unfounded.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Pursuant to Fed. R. App. P. 29(g), in the event that this Court grants oral argument to the principal parties, it is hereby requested that the Court allow Powertech to participate in oral argument.

Dated this 30th day of August, 2017:

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CONCLUSION

For the reasons discussed above, Powertech respectfully requests that this Court dismiss the Petitioner's Petition for Review for lack of jurisdiction or, if jurisdiction is found, the Petition for Review should be denied.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/**

Christopher S. Pugsley, Esq.

Dated: August 30, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure and Circuit Rule 32(e)(C), I hereby certify:

The foregoing Initial Brief of Intervenor-Respondent Powertech (USA), Inc. complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 32€ because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), the Brief contains 8,542 words, as calculated by the word processing software program with which the Brief was prepared.

The Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it was prepared in a proportionally spaced typeface in 14-point Time New Roman font using Microsoft Word 2013.

Respectfully Submitted,

**/Executed (electronically) by and in
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **INITIAL BRIEF OF INTERVENOR-RESPONDENT POWERTECH (USA), INC.** was served on all counsel of record in case number 17-1059 through the electronic filing system (CM/ECF) of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully Submitted,

**/Executed (electronically) by and in
accord with 10 C.F.R. § 2.304(d)/**

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